BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: SKYLENE S. Claimant, vs. KERN REGIONAL CENTER, Service Agency.	Case No. 2010070099

DECISION

The hearing in the above-captioned matter was held on March 7, 2011, at Tehachapi, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. Kern Regional Center (KRC or Service Agency) was represented by Jeffrey F. Popkin, LCSW, ACSW, C-ASWCM, Associate Director. Claimant Skylene S. (Claimant or Skylene) was represented by parents, Cynthia S. and Ron S.[1]

The above-captioned matter was consolidated for hearing with two other cases, which involved Claimant's siblings, as the cases involved common questions of law and fact. Those other cases have case numbers 2010090026 and 2010090979. However, a separate decision will issue in each case.

Evidence was received, argument was heard, and the case was submitted for decision on March 7, 2011.

[1] Initials are used for the family surnames to protect Claimant's privacy.

ISSUE PRESENTED

The issue in this case is whether Claimant is entitled to an eligibility assessment from KRC under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.[2]

FACTUAL FINDINGS

1. Claimant Skylene S. is a 15-year-old girl who lives within the Service Agency's catchment area.[3] She sought eligibility for services from the Service Agency in 2010. She and her two brothers live with their adoptive parents, Ron and Cynthia S.

2. On or about June 4, 2010, KRC issued a Notice of Proposed Action, denying a diagnostic evaluation of Claimant, on the grounds that there was no indication that she had an eligible condition. Claimant's parents filed a Fair Hearing Request on or about June 26, 2010. The case was set for hearing in October 2010, but continued at Claimant's request. All jurisdictional requirements have been met.

3. On August 25, 2010, KRC wrote Claimant's parents, regarding her potential eligibility. That letter, Exhibit 5, stated, in pertinent part:

> On August 12, 2010, the Kern Regional Center Diagnostic Interdisciplinary Team met to review the additional records that you provided at our meeting of August 3, 2010. The Team found Skylene not to have an eligible diagnosis for the Kern Regional Center. . . . It was the Team's impression that Skylene's primary diagnosis is of a behavioral and psychiatric nature. . . .

4. Mr. and Mrs. S. were foster parents for Claimant from the time she was four, adopting her at age six. Her birth mother used methamphetamine and consumed alcohol while pregnant with the child; her biological father used heroin. Her mother committed suicide when Claimant was four years old. Before foster care with Mr. and Mrs. S., she was shuttled between her birth mother and foster homes.

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[2] All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

[3] Claimant is currently in a placement outside the catchment area, but her family remains in the KRC catchment, and she resided there when she sought services.

There are indications of sexual abuse, in a foster home, when she was approximately three years old. (Ex. 11; Ex. 12.)

5. Claimant has a long history of behavioral problems and psychiatric diagnoses. A December 2007 report generated by UCLA, where Claimant was then hospitalized, states that she had "a history of bipolar disorder, ADHD, oppositional defiant disorder, and possible FAS [Fetal Alcohol Syndrome] who was brought in by parents following a 1 month exacerbation of behavioral problems at home and at school." (Ex. 11, p. 1.)

6. When discharged from UCLA in December 2007, the discharge diagnoses was "h/o [history of] Intermittent Explosive DO [disorder], r/o [rule out] Mood disorder, NOS [Not Otherwise Specified], rule out bipolar disorder, rule out Mood DO secondary to general medical illness, h/o ADHD, h/o OOD [Oppositional Defiant Disorder]." (Ex. 12, p. 1.) Diagnosis on Axis II, where mental retardation might be set forth, was deferred.

7. (A) The psychiatric consultation and discharge summary generated at UCLA during the 2007 hospitalization (Ex. 11 and 12, respectively) describe numerous behaviors and symptoms, indicative of psychiatric disorders as opposed to developmental disabilities of the type encompassed by the Lanterman Act.

(B) For example, her mother described a child who hit, bit, and aggressively attacked other family members, while at times being irritable and paranoid. She would hit her head or bang it when angry, and had mood swings that included depressive behavior. She would threaten to harm others or herself, especially if she could not get her own way. The Claimant, then 10 years of age, was sexually provocative at times. She would steal from her family and others.

(C) She was then in a regular fifth grade classroom, with a resource class for reading, although she had been deemed eligible for special education services on the basis of emotional disturbance. Her grades were between B's and C's, but her mother informed UCLA staff that Claimant sometimes earned A's and B's. (Ex. 11, p. 2.)

(D) The UCLA reports do not describe the types of communication problems, repetitive behaviors, or intense interests typical of Autism or Autism Spectrum Disorders.

8. That Claimant suffered from Bipolar Disorder and ADHD was verified by her psychiatrist, Apurva Shah, M.D. in early 2008. (Ex. 10.) At that time, she was receiving a number of medications including Abilify, Depakote ER, and Vyvanse. Another psychiatrist stated, in August 2008, that she was being treated with Abilify, Lithium, Loxitane, Thorazine, and Depakote, along with the Vyvanse. (Ex.9.) That psychiatrist, Dr. Morong, described her as very difficult to manage on an outpatient

basis, and in the home and school. He stated she had to be watched at all times, as she would act out if she did not get her way.

9. (A) In June 2009, when she was 12 years of age, she was tested at UCLA's Laboratory of Neuro Imaging, as part of a research project involving the effects of alcohol or methamphetamine on children. Numerous tests were administered to Claimant, and the results summarized in a report, Exhibit 7.

(B) It must be noted that the report states, at the beginning, and again at the end, that the assessment was not meant to be and did not constitute a comprehensive neuropsychological evaluation, and "that the results are not sufficient to provide a diagnosis or to make specific recommendations regarding services or other interventions. (Ex.7, p. 1, p. 8.)

10. (A) Claimant received an IQ test, the Wechsler Intelligence Scale for Children, Fourth Edition, Integrated (WISC-IV-I). Claimant's overall IQ was 70, placing her in the second percentile overall. (Ex. 7, p. 2.) The report notes that when the scores on four key indexes, Verbal Comprehension, Perceptual Reasoning, Working Memory, and Processing Speed, are consistent with one another, the full scale IQ score is thought to be a good estimate of overall intellectual development. (*Id*.)

(B) The results of the Verbal Comprehension and Perceptual Reasoning indexes placed Claimant in the 10th and 12th percentiles, respectively. The results of the Working Memory Index and Processing Speed Indexes placed the child in the third and first percentiles, respectively. (Ex. 7, p. 2.) Though not clearly stated, the index scores, or at least two of the four, are very consistent with the full scale IQ score, providing some indicia of reliability.

11. The results of the Wide Range Achievement Test, Third Edition, showed Claimant's academic achievement to be weak, with math scores in the second percentile, with word comprehension tests placing her in the eighth, thirteenth, and eighteenth percentiles.

12. A Vineland Adapative Behavior Scales II was administered. Her communication skills were deemed to be at the 14th percentile, and her Daily Living Skills were at the 2nd percentile. As to the third domain, social skills, she was found at the 1st percentile. (Ex. 7, p. 7.)

13. In mid-February 2011, Claimant was assessed for Fetal Alcohol Specturm Disorder at UCLA. She was diagnosed with Partial Fetal Alcohol Syndrome. In part, this was based on a finding of central nervous system dysfunction. (Ex. A, p. 2.)

14. The KRC diagnostic team completed a document that summarizes pertinent information regarding eligibility. Finding that there was no evidence of an eligible condition, the team noted "low IQ scores may be an artifact of psychiatric/behavioral disturbance or the treatment thereof." (Ex. 6.) Among the comments and recommendations listed on the document is a note that "school records needed."

15. The Diagnostic and Statistical Manual IV of Mental Disorders, Text Revision, published by the American Psychiatric Association (hereafter DSM), is the most widely accepted source of diagnostic criteria for developmental disorders such as Mental Retardation and Autism. It teaches that the essential features of mental retardation are a significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning, in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. (DSM, p. 41.) "Significantly subaverage intelligence" is defined as an IQ of about 70 or below; there is a possible error of measurement of approximately five points, depending on the IQ test used. (*Id*.) Put another way, "significantly subaverage" translates to IQ scores falling in the second percentile. It must also be noted that for a person to received a diagnosis of mental retardation, the onset must occur before age 18.

16. The record reveals that Claimant has scored a 70 on a standard IQ test, and her adaptive function is significantly impaired as illustrated by her Vineland scores. There appeared to be some consistency among the four index scores from the IQ test, as noted in Factual Finding 10(B). While a composite Vineland score was not provided, two of the three domains fall at or below the second percentile, and are clearly significantly subaverage; is inferred that with the third domain score rising only to the 14th percentile, the composite score would show significant impairment. Thus, the results of two standardized tests, are indicative of mental retardation.

17. The diagnostic team stated that the low IQ scores "may" be an artifact of psychiatric conditions or treatments. Then again, they may not. The DSM teaches that those with Mental Retardation often have other mental disorders. At the same time, it teaches that the etiology of Mental Retardation may be primarily biological, or primarily psychosocial, or a combination of both. Among the predisposing factors listed in the DSM is an early alteration of the embryonic environment, which includes prenatal damage due to toxins, such as maternal alcohol use. Plainly, methamphetamine abuse would also be a toxin.

LEGAL CONCLUSIONS

1. Jurisdiction exists to conduct a fair hearing in the above-captioned matter, pursuant to section 4710.5, based on Factual Findings 1 and 2.

2. Section 4512(a), defines developmental disabilities within the meaning of the Lanterman Act as follows:

> "Developmental disability" means a disability which originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

This latter category is commonly known as "the fifth category."

3. (A) Regulations developed by the Department of Developmental Services, pertinent to this case, are found in Title 17 of the California Code of Regulations (CCR).[4] At section 54000 the statutory definition of "developmental disability" is essentially reiterated. The developmental disability must originate before age eighteen, be likely to continue indefinitely, and constitute a substantial handicap for the individual.

(B) Under section 54000, subdivision (c), some conditions are excluded. They are:

> (1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

[4] All further references to the CCR are to title 17 thereof.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

4. (A) The regulations also speak to the definition of substantial disability. CCR section 54001(a) provides that,

"Substantial disability means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Communication skills;
(B) Learning;
(C) Self-care;
(D) Mobility;
(E) Self-direction;
(F) Capacity for independent living;
(G) Economic self-sufficiency."

5. (A) Section 4642, relied on by the Service Agency in this case, provides, in pertinent part, that "any person believed to have a developmental disability, and any person believed to have a high risk of parenting a developmentally disabled infant shall be eligible for initial intake and assessment services in the regional centers." The statute defines initial intake to include the provision of information and advice about the nature of and availability of services that are provided by regional centers and "other agencies in the community." Those other services might include mental health, housing, education, and vocational training.

(B) The statute concludes by stating that "intake shall also include a decision to provide assessment." Section 4642 may be read as making assessment optional, and not mandatory. As indicated by section 4643, assessment is a more in-depth analysis of a person's condition than is the basic intake process. It implies that testing of some sort would be performed, and a more in-depth review of historical and other information might take place.

6. (A) In all the facts and circumstances, the Service Agency should have performed a full and complete assessment of Claimant. While there is significant evidence that her aberrant behaviors and seeming inability to easily co-exist with others arise from a psychiatric condition, on prior occasions a diagnosis on Axis II was deferred. At bottom, the only IQ score in the record provides prima facie evidence of significantly subaverage intellectual capacity, and an available Vineland test indicates rather subaverage adaptive skills. For the team to conclude that the low IQ scores—seemingly the only ones ever obtained—may be an "artifact" of psychiatric issues or treatment does not negate the possibility that the scores may be a function of mental retardation.

(B) Section 54000, subdivision (c) of the regulations does not apply unless a causal connection is established between the psychiatric and cognitive issues; that causal connection is not established by a record review, especially one where it is acknowledged that there has been no access to school records. Further, it appears that a better practice would involve an actual examination or observation of the Claimant.

7. On other occasions, the ALJ has agreed that available evidence supported the belief that a person seeking intake could not have an eligible condition, obviating the need for assessment. (E.g., *Sergio M. v. K.R.C*, OAH No. 2006100834 (2007) [IQ tests showed low average intelligence and other data indicated only a learning disorder].) That is plainly not the case here. Furthermore, the use of section 4642 to avoid proper assessment practice should be avoided, lest the regional centers resort to the use of quasi-assessments to determine eligibility.

8. Nothing in this decision should be construed as a finding that Claimant is eligible. It is a decision that there is sufficient information to warrant an in-depth assessment of this girl, with an eye toward determining her status. This may require interviews with a number of sources of information, including her psychiatrists, staff at her current placement, staff at UCLA, as well as an in-depth record review. Direct observation of the child, and administration of recognized test instruments, is plainly desirable.

ORDER

The appeal of Claimant Skylene S. is granted, and she shall be thoroughly assessed for eligibility under the Lanterman Act.

Dated: May 27, 2011

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Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

NOTICE:

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.